IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0352
Appellee,	)	DEPARTMENT A
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
LANCE TODD DUNBAR,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-33800

Honorable Hector E. Campoy, Judge

AFFIRMED

Jacqueline Rohr — Tucson
Attorney for Appellant

P E L A N D E R, Chief Judge.

¶1 In September 1992, an eight-person jury found appellant Lance Todd Dunbar guilty of unlawfully possessing heroin and promoting prison contraband. When Dunbar twice failed to appear for sentencing, a bench warrant was issued for his arrest. The warrant was served in 1995 while he was in the Arizona Department of Corrections (ADOC) serving a sentence in another matter. He was later released from custody on bond in October of that

year on condition he appear in court in this case on October 25, 1995, which he again failed to do.

¶2 In 2006, after discovering that Dunbar was again in ADOC's custody, the prosecutor moved to set a sentencing date. On September 19, 2006, the trial court sentenced Dunbar to concurrent, presumptive, four- and seven-year prison terms, to be served concurrently with the concurrent, twelve- and eighteen-year sentences imposed on him a year earlier in three Maricopa County cases.

¶3 Appellate counsel has filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967), and she has satisfied *State v. Clark*, 196 Ariz. 530, ¶ 32, 2 P.3d 89, 97 (App. 1999), by "setting forth a detailed factual and procedural history of the case with citations to the record, [so] this court can satisfy itself that counsel has in fact thoroughly reviewed the record." Counsel states she has reviewed the record thoroughly without finding any reversible error and asks us to search for fundamental error pursuant to *Anders*. Dunbar has filed a supplemental brief raising multiple issues.

¶4 First, Dunbar contends he should have had a jury comprised of twelve rather than eight jurors because he potentially faced consecutive sentences of thirty years or more. *See* Ariz. Const. art. II, § 23; A.R.S. § 21-102(A), (B). Indeed, the record contains a minute entry of a June 22, 1992, status conference that states, "12-person jury needed." But the transcript of Dunbar's trial commenced with the court's confirming that counsel had agreed

to an eight-person jury "[f]or reasons we spoke of just a couple of minutes ago"—although those reasons are not stated in the court's minute entry or elsewhere in the record.

¶5 The indictment charged Dunbar with two, class two felonies.[1] The presumptive sentence for a class two felony in April 1990, when he committed the crimes, was seven years. *See* 1988 Ariz. Sess. Laws, ch. 66, § 1. The state alleged he had previously been convicted of other felonies in 1984 and 1986. Under former A.R.S. § 13-604(D), the enhanced range of sentence for a class two felony committed with two or more prior convictions was fourteen to twenty-eight years. 1987 Ariz. Sess. Laws, ch. 307, § 3. Thus, only if Dunbar's sentences on the two counts could have been consecutive might he have been sentenced to prison for thirty years or more.

¶6 Under the facts of this case, consecutive sentences would not have been permissible because both charges arose from a single act. Pursuant to A.R.S. § 13-2505(A)(3), the crime of promoting prison contraband required proof that Dunbar had knowingly possessed contraband while confined in a correctional facility. Whether Dunbar possessed the heroin for sale or for personal use, the same possession and the same heroin lay at the core of each offense. As the prosecutor stated in closing argument, "[t]he charges are really one and the same, in a sense." Concurrent sentences were, therefore, legally

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[1]Count one of the indictment charged Dunbar with possession of heroin for sale, a class two felony. *See* A.R.S. § 13-3408(B)(2). The jury found him not guilty of possessing the heroin for sale but guilty of the lesser-included offense of unlawful possession, a class four felony. *See* § 13-3408(B)(1).

required by A.R.S. § 13-116, and we presume the parties stipulated to an eight-person jury in recognition of that fact. Dunbar's consent was not required because he was not entitled to a twelve-person jury.

¶7 Second, Dunbar contends "[t]he trial court was set up in such a manner that [he] was unable to assist counsel during trial thereby preventing counsel from providing . . . effective assistance" and denying Dunbar his right to a fair trial. He has neither elaborated on his conclusory assertion nor cited any pertinent portion of the record, *see* Rule 31.13(c)(1)(vi), Ariz. R. Crim. P., 17 A.R.S., so it is possible he failed to preserve the issue for appeal by objecting below. In any event, this court will not address claims of ineffective assistance of counsel on appeal. *See State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002). Regardless, in the absence of any explanation of the underlying facts, we lack sufficient information to review his claim and cannot address a contention we do not fully understand.

¶8 Third, Dunbar claims:

> The testimony by Pat Wertheim, Keith Schubert, [and] Johnn[i] Jones clearly shows that Officer . . . Arthur Gomez manufactured the crimes, testimony clearly shows that the Gomez testimony should have been stricken.[2] The prosecutor

[2]Pat Wertheim is a latent fingerprint examiner at the Arizona Department of Public Safety (DPS), who testified that he had been unable to find any fingerprints on the "bindles" of heroin Dunbar was accused of possessing. Keith Schubert is a DPS criminalist who analyzed the contents of a plastic bag and determined the brown substance contained in eleven smaller "packets" within the bag consisted of 185.7 milligrams of heroin. Johnni Jones is a criminal investigator for ADOC who testified about his investigation in this case

> by knowingly using evidence which plainly is false to obtain the convictions violated the Sixth and Fourteenth Amendments. Take away the different version of the same act given by Mr. Gomez, there is no evidence.

¶9 That broad assertion, unaccompanied by references to any specific testimony, is the sum and substance of Dunbar's argument. After reading the trial transcript in its entirety, we disagree with his characterization of the testimony and reject his argument. Inconsistencies in a witness's testimony or conflicts between the testimony of different witnesses are not grounds for striking the testimony. "[I]nconsistencies in witness testimony go not to the admissibility of testimony, but rather[,] to the credibility of the witnesses and the weight to be accorded to the evidence, which are issues for the jury to resolve." *State v. Rivera*, 210 Ariz. 188, ¶ 20, 109 P.3d 83, 87 (2005). The jury here resolved the various inconsistencies and conflicts in the evidence in favor of the state, as was its prerogative. *See id.*

¶10 Next, Dunbar contends "[t]he chain of custody of the evidence clearly shows evidence was tampered with and when this testimony came to light the evidence should have been suppressed[.] Take away the tainted evidence [and] there is no evidence." Again, this is the entirety of Dunbar's argument. Without a more factually detailed explanation of his claim and without citations to the specific testimony and physical evidence to which Dunbar

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and his handling of the physical evidence he had received from a prison "search team member."

is referring, *see* Rule 31.13(c)(1)(vi), Ariz. R. Crim. P., there is no trial court ruling for us to review and no specific legal issue to address.

¶11 His fifth contention is that, after he had failed three times to appear in court either for sentencing or to have a sentencing date set, the state did not thereafter make diligent efforts to locate him in prison in the eleven years between October 21, 1995, when he was released on bond and ordered to appear in court four days later, and his eventual sentencing in 2006. During a portion of that time, Dunbar was in the custody of ADOC, and he claims the state should have taken steps to find and sentence him then. Because the state did not have a legitimate reason for the delay, he contends, his conviction is invalid under "the doctrine of laches."

¶12 Dunbar cites no legal authority for his dubious assertion that the equitable doctrine of laches applies to a criminal prosecution. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi). Dunbar does, however, have a right under both the United States and Arizona Constitutions to a speedy trial. *See* U.S. Const. amend. VI; Ariz. Const. art. II, § 24. And the right to a speedy trial has been held to encompass sentencing as well. *State v. Burkett*, 179 Ariz. 109, 114, 876 P.2d 1144, 1149 (App. 1993).

¶13 "The framework for analyzing the delay between conviction and sentencing is the four-part test articulated in *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101 (1972)." *Burkett*, 179 Ariz. at 114, 876 P.2d at 1149; *see also State v. Schaaf*, 169 Ariz. 323, 327, 819 P.2d 909, 913 (1991) (Arizona Supreme Court

applies standards of *Barker* to analyze speedy trial claim). Under *Barker*, a court must consider the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." 407 U.S. at 530, 92 S. Ct. at 2192. "Of these factors, length of delay is the least important and prejudice is the most important." *Burkett*, 179 Ariz. at 115, 876 P.2d at 1150.

¶14 Although the record does not contain any explanation for the lengthy delay in sentencing Dunbar, it is clear that Dunbar's repeatedly absenting himself and failing to appear in court when ordered to appear was a central contributing factor. He claims he was imprisoned in Arizona and thus available for sentencing during some of the intervening time, but he does not contend—and the record does not reflect—that he asserted his speedy trial rights at any time before 2006 by coming forward and asking to be sentenced. Most importantly, Dunbar has sustained no discernible prejudice as a result of the delay. The trial court imposed presumptive, unenhanced sentences that Dunbar will serve concurrently with the considerably longer Maricopa County sentences he is already serving. Indeed, if the delay in sentencing on these charges has had any practical effect on him at all, Dunbar has failed to allege it.

¶15 Finally, Dunbar contends he was denied a fair trial and due process of law when the two fellow prisoners he called as defense witnesses at trial, inmates Ralph Hall and Raiji Holt, remained "in prison garb[] and handcuffs" while they testified. Defense counsel had objected that having to testify while handcuffed "t[ook] away from the credibility of the

witnesses," was frightening to the jurors, and was prejudicial to Dunbar. Hall was serving a sentence for murder, and Holt had been convicted of manslaughter. The trial court cited concerns for security and for the "safety of the jury" in denying Dunbar's request to have the two inmates' handcuffs removed while they testified. We cannot say the trial court abused its discretion, particularly because Dunbar was on trial for promoting prison contraband, and the jury was thus necessarily aware that the events at issue had occurred inside a prison. *See State v. Chavez*, 98 Ariz. 236, 242, 403 P.2d 545, 550 (1965) (trial court has discretion in restraining defendant or witnesses for safety during trial).

¶16 In short, none of the issues Dunbar raises warrants reversal, and we have found no fundamental error. Dunbar's convictions and sentences are therefore affirmed.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge